IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KEYSTONE HELICOPTER	:	CIVIL ACTION
v.	:	
TEXTRON INC., AVCO CORP. TEXTRON LYCOMING TURBINE ENGINE DIV. AMER. EUROCOPTER CORP., MBB HELICOPTER CORP., ALLIEDSIGNAL INC.	:	No. 97-257

M E M O R A N D U M

Ludwig, J. May __, 1999

Defendant American Eurocopter Corporation (AEC) moves for clarification of order dated November 6, 1998 in which summary judgment as to plaintiff Keystone Helicopter's breach of warranty claims was denied. Material fact questions remained as to whether this defendant warranted the engines in helicopters that were leased to plaintiff after 1990. See order, Nov. 6, 1998, ¶ 2. The clarification now requested concerns whether summary judgment was intended to be granted with respect to helicopters sold to plaintiff before 1991, when the leasing program was initiated.[1]

According to uncontroverted evidence, the last helicopter sale - as opposed to lease - by AEC to plaintiff occurred on December 20, 1990. Def. mem. at 5; ex. X. Also it is undisputed that the

[1]"Summary judgment should be granted if, after drawing all reasonable inferences from the underlying facts in the light most favorable to the nonmoving party, the court concludes that there is no genuine issue of material fact to be resolved at trial and the moving party is entitled to judgment as a matter of law." In re Baby Food Antitrust Litig., 166 F.3d 112, 124 (3d Cir. 1999) (quoting Petruzzi's IGA v. Darling-Delaware, 998 F.2d 1224, 1230 (3d Cir. 1993)).

standard warranty language in the parties' purchase agreements excluded the engines, which were manufactured by defendant Textron, Inc. Def. mem. at 6.[2]

Plaintiff asserts that various statements made by AEC gave rise to separate warranties on the engines.[3] None of those statements occurred before the last sale in 1990. Pl. resp., ex. 4, 6-8. Accordingly, they cannot have formed a basis for the bargain as required under 13 Pa. C.S.A. § 2313(a). See Heffler v. Joe Bells Auto Serv., 946 F. Supp. 348, 353 (E.D. Pa. 1996) (affirmation of fact must be a basis of the bargain to give rise to an express warranty).

The issue, therefore, is whether the warranty exclusion in the purchase contracts is valid and enforceable. Under 13 Pa. C.S.A.

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[2]The warranty reads in relevant part:

> 9.1 The articles purchased hereunder shall at the time of delivery be free from defects in material and workmanship, excluding . . . engines . . ..
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> 9.6 THE FOREGOING WARRANTY IS EXCLUSIVE AND IS GIVEN IN LIEU OF (I) ALL OTHER WARRANTIES, EITHER EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE AND (II) ANY OBLIGATION, LIABILITY, RIGHT, CLAIM, OR REMEDY IN CONTRACT OR TORT WHETHER ARISING FROM THE SELLER'S NEGLIGENCE OR STRICT LIABILITY. THE REMEDIES OF THE PURCHASER SHALL BE LIMITED TO THOSE PROVIDED HEREIN TO THE EXCLUSION OF ANY AND ALL OTHER REMEDIES INCLUDING, WITHOUT LIMITATION, INCIDENTAL, CONSEQUENTIAL, OR SPECIAL DAMAGES.

[3]Whether these statements amounted to warranties of the engines leased to plaintiff after 1990 was the basis for the earlier denial of summary judgment. Order, November 6, 1998.

§ 2313(a), parties to a contract may modify or exclude warranties so long as they do so in writing and with sufficient conspicuousness. Here, the exclusion of the engines from the warranties was clear and conspicuous and put plaintiff on notice that the engines were not warranted. See Earl Brace & Sons v. Ciba-Geigy Corp., 708 F. Supp. 708, 709 (W.D. Pa. 1989) ("A limitation [of liability] is clear and conspicuous if a reasonable person would have noticed and understood it.").

Plaintiff makes three arguments against the enforceability of the exclusions - the warranties failed of their essential purpose; the exclusions are unconscionable; and the warranties were fraudulently obtained. The first argument, failure of essential purpose, 13 Pa. C.S.A. § 2719(b), is inapt. The language of 13 Pa. C.S.A. § 2719[4] and the cases make clear that this statutory provision pertains to limitations of contractual remedies for defects in a warranted product. See, e.g., Ragen Corp. v. Kearney and Trecker Corp., 912 F.2d 619, 624-25 (3d Cir. 1990) (interpreting comparable provision in Wisconsin law); Kruger v.

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[4]13 Pa. C.S.A. § 2719 reads in relevant part:

> (a)(1) The agreement may provide for remedies in addition to or in substitution for those provided in this division and may limit or alter the measure of damages recoverable under this division, as by limiting the remedies of the buyer to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts.
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> * * *
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> (b) Exclusive remedy failing in purpose.-Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this title.

Subura of America, Inc., 996 F. Supp. 451, 458 (E.D. Pa. 1998) (interpreting Pennsylvania provision). Here, the warranties did not simply limit the available remedies; they excluded the engines altogether. Def. mem. at 6. Accordingly, the validity of the exclusion is governed by 13 Pa. C.S.A. § 2316.[5]

Next, the exclusion was not unconscionable. See Borden, Inc. v. Advent Ink Co., __ Pa. Super. __, __, 701 A.2d 255, 264 (1997) (whether contractual provision is unconscionable is a question of law for the court). "In determining whether a clause is unconscionable, the court should consider whether, in light of the general commercial background . . ., the clause is so one-sided that it is unconscionable under the circumstances." Jim Dan, Inc. v. O.M. Scott & Sons Co., 785 F. Supp. 1196, 1200 (W.D. Pa. 1992). Unconscionability involves oppression and unfair surprise, not the allocation of risks for which the parties have contracted in a business relationship. See Borden, __ Pa. Super. at __, 701 A.2d at 264 (citing 13 Pa. C.S.A. § 2302, cmt. 1).

Here, plaintiff is an experienced corporate entity with extensive knowledge of helicopters and helicopter engines. Jim Dan, Inc., 785 F. Supp. at 1200 (warranty limitations are rarely found to be unconscionable in a commercial setting) (citations

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[5]See 13 Pa. C.S.A. § 2316, cmt. 2 ("This Article treats the limitation or avoidance of consequential damages as a matter of limiting remedies for breach, separate from the matter of creation of liability under a warranty. If no warranty exists, there is of course no problem of limiting remedies for breach of warranty."); Earl Brace & Sons v. Ciba-Geigy Corp., 708 F. Supp. 708, 711 ("There can be no breach where the warranty has been disclaimed pursuant to Section 2316 . . .."); 67A Am. Jur. 2d Sales § 824 (1985) ("A disclaimer of warranties clause and a limitation of remedies clause are two separate and distinct entities . . . .").

omitted). Moreover, plaintiff does not contend that the airframes manufactured by AEC were defective, D'Aries dep., at 38-39, but only the engines manufactured by Textron. Throughout the relevant time period, plaintiff went to Textron for redress. D'Aries dep., at 70; Wright dep., at 127-32, 181-83; Koss decl., ex. HH, II, PP. Furthermore, plaintiff knew the engines were experiencing problems before it entered into purchase contracts with AEC. D'Aries dep., at 39-41; Loney dep., at 69-71; Wright dep., at 28. Such prior knowledge belies plaintiff's contention that it lacked a meaningful choice. See Borden, __ Pa. Super. at __, 701 A.2d at 264 (contractual provision is unconscionable if one of the parties had no meaningful choice, and the provision unreasonably favors the other party). The evidence shows that the exclusion of the engines was consistent with the expectation of the parties - and did not result in oppression or unfair surprise.[6] See also Wright dep., at 87 (plaintiff's president and CEO testifying to his belief that AEC did not warrant the engines).

The third argument, that defendant fraudulently induced the warranty exclusions, even if true, would not create a warranty where none existed. "When a contract is induced by fraud . . . the injured party has a choice of alternative remedies: he may either rescind the contract or affirm it and maintain an action in deceit for damages." Mellon Bank Corp. v. First Union Real Estate Equity

[6]The warranty exclusion also appears to be consistent with federal regulations that treat the airframe and aircraft engine as separate components. See, e.g., 14 C.F.R. § 21 et seq. See also Smith v. Reynolds Metals Co., 323 F. Supp. 196, 197 (M.D. Pa. 1971) (upholding defendant's disclaimer of warranty for products manufactured by another party).

and Mortgage Investments, 951 F.2d 1399, 1408 (3d Cir. 1991). There appears to be no authority for the proposition that an allegation of fraud may support a separate claim for breach of warranty. See also Cabot v. Jamie Record Co., 1999 WL 236737, *2 (E.D. Pa. April 19, 1999) (Pennsylvania law does not allow for partial rescission) (citing Sherman v. Medicine Shoppe Int'l, Inc., 581 F. Supp. 445, 450 (E.D. Pa. 1984)).

Accordingly, on breach of warranty claims as to helicopters purchased by plaintiff, the last sale having occurred on December 20, 1990, defendant AEC is entitled to judgment as a matter of law.

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Edmund V. Ludwig, J.

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ORDER

AND NOW, this ___ day of May, 1999, upon defendant American Eurocopter Corporation's (AEC) motion for clarification of the order of November 6, 1998, summary judgment on the warranty claims (counts IV and V) is granted as to the sale of helicopters made by AEC to plaintiff Keystone Helicopter. Fed. R. Civ. P. 56(c), 60.

A memorandum accompanies this order.

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Edmund V. Ludwig, J.